THE LAW, AND ITS INTERPRETATION, DISTINGUISHED.

The blotter on my office table, by the courtesy of a Law Book Company of another State, advertising one of its publications, bears in plain print a new and startling definition of LAW—*"The Law Is the Last Interpretation of the Law Given by the Last Judge"*—a definition thought out by someone somewhere and committed to this blotter to be conveyed to the world as a truth. Inasmuch as this differs materially from all the well-known definitions of Law, it is open to criticism, and we shall see briefly if this blotter is not made to carry a contraband definition.

The constitution of the United States provides a legislative, an executive and a judicial department of the Federal Government, to enact, interpret and execute the law. The State of Virginia early provided a form of government for herself in which the legislative, executive and judicial departments were not only secured to her people but it forbade that any one of these departments should exercise the powers properly belonging to another. If, therefore, the courts of Virginia by "the last interpretation of the law," make law, they thereby violate the constitution of the State by exercising a power properly belonging to the General Assembly.

In fact, the law is what it is and not necessarily what it may be interpreted to be by the last judge. An overworked judge may find it easier and quicker to give an opinion than to take the time and bestow the labor necessary to find out what the law really is.

Statute law emanates from the people and from the legislative department of the government. The people make the State Constitution and within its limitations the legislature enacts other statute laws, and these laws are just what they are when enacted and can not be changed by interpretation. They may be misinterpreted by the court, and the public may be compelled to follow the decision of the court and not the law, but still the law is there unchanged and will remain as enacted until repealed by the enacting power.

The division line between two counties was duly established

by the legislature many years since. It can not be changed except by the power that established it. The services of civil engineers have been invoked to locate this line, and their surveys differ. It can not be safely said that the last survey is necessarily the correct one, nor can it be safely contended that any one of the surveys has changed the line a hair's breadth. The line is there, established, and though it may or may not be found, no mere surveyor can change its location. *A fortiori,* the court's interpretation of the law can not change the law.

Just what may be necessary to enable one to maintain an action for malicious prosecution is a question of law. In June, 1900, the Supreme Court of Appeals of Virginia in Ward *v.* Reasor, 98 Va. 399, 36 S. E. 470, interpreted the law to be that the plaintiff must allege and prove "that the prosecution alleged in the declaration was conducted to its termination, and that it ended in the final acquittal of the plaintiff;" and that a proceeding which amounts to no more than a nolle prosequi is not sufficient ground for an action for malicious prosecution. According to the blotter that interpretation of the law was the law in Virginia until September, 1905, when the same court held in Graves *v.* Scott, 104 Va. 372, 51 S. E. 821, that its interpretation of this law in Ward *v.* Reasor, was not correct, and further held that "there need not have been a trial on the merits," that any termination of the prosecution without resulting in the conviction of the plaintiff is sufficient basis for an action for malicious prosecution.

Here are two interpretations of the law directly opposed to each other. The blotter says the last interpretation is the law since September, 1905, and that prior thereto the former interpretation was the law. The last interpretation of this law may be the law, the former interpretation may be the law, after all; but it is submitted that neither interpretation changed the law. The law remains what it was before these cases were decided, and the court has been endeavoring to ascertain what the law is in this matter, and in its endeavor changed its opinion, not the law.

The same court held in McClanahan *v.* Western Lunatic Asylum (December, 1891), 88 Va. 466, that the statute of limi-

tations was a good defense to an action brought by that institution for money due; but again the court, composed of the same judges, except one, overruled this interpretation and held in Eastern State Hospital *v.* Graves (March, 1906), 105 Va. 151, 52 S. E. 837, that the statute of limitations is not a good plea against such institution and overruled its interpretation of the law in the McClanahan case. There was no change made in this law by the General Assembly of Virginia between 1891 and 1905, but the court changed its interpretation of the law. One of these interpretations is not correct, and not being correct cannot be the law. If the former one was wrong, then it was not the law from 1891 to 1905; if the last interpretation is wrong it is submitted that it is not the law now.

The courts admit themselves that they do not make laws. Mr. Justice Story in delivering the opinion of the Supreme Court of the United States in the case of Swift *v.* Tyson, 16 Peters, 1, 10 L. Ed. 865, said: "In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and not of themselves laws." This interpretation has been followed by many other courts and it seems now to be agreed that the decisions of the courts are only *prima facie* evidence of what the law is. In the case of Falconer *v.* Simmons, 51 W. Va. 172, 41 S. E. 193, the court holds that, "An overruled decision is regarded as never having been the law, even at the date of the erroneous decision."

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